a different contract, the defendant offered such surplus as a set-off. *Held*, that the right to such surplus was not *res judicata*. *Gordon* v. *Van Cott*, 56 N. Y. Supp. 554.

The court distinguishes *O'Connor* v. *Varney*, 10 Gray, 231, and the authorities cited in 21 Am. & Eng. Ency. Law, 224, for the proposition that "a set-off cannot be split up so as to have a portion of it adjudicated in the first suit and a subsequent action brought for the remainder" by the circumstance that in those cases the defendant might have recovered the surplus, if any, over against the plaintiff in the original proceeding; and hence the question whether there was any such surplus, was in issue in the first suit. In the principal case, since no recovery of the surplus could have been had, its existence could not have been in issue. *Hennell* v. *Fairlamb*, 3 Esp. 104; 1 Chit. Pl. 603.

In Virginia, it is clear that a set-off cannot be used 'as a shield, and afterwards as a sword,' since our statute provides for a recovery of the surplus over against the plaintiff, unless he is an assignee, and the set-off is against the assignor, in which case defendant may waive the excess and use his set-off to repel the claim only; or he may have the original creditor brought into the suit, and use a portion of his set-off to repel the assignee's claim, and recover judgment against the original creditor for the surplus. Va. Code, sec. 3304. See *Huff* v. *Broyles*, 26 Gratt. 283.

It is not clear whether by waiving the excess, in the suit by the assignee, the statute intends the waiver to apply only to that proceeding, and to permit a subsequent action to recover the surplus from the person under whom the plaintiff claims, and against whom the counter-claim exists, or whether such waiver is for all purposes. It would seem, however, that the waiver is final, and that the counter-claim is thereby exhausted, and becomes *res judicata*.

PRINCIPAL AND AGENT—NATIONAL BANKS—PERSONAL LIABILITY OF AGENT, ON UNAUTHORIZED CONTRACT.—Directors of a national bank, before the comptroller of currency had authorized it to do business, leased the property of the plaintiff for a term of years, executing the lease in the name of the bank. After having received proper authority to begin business the bank occupied the premises for a few months and then repudiated the lease and vacated the premises. *Held*, that under U. S. Rev. Stat., sec. 5136, prohibiting the transaction of any business "except such as is incidental and necessarily preliminary to its organization," until authorized by the comptroller to commence business, the bank was not bound by the lease; nor was the same made good by estoppel, save as to liability for the value of what the corporation actually received and enjoyed. *McCormick* v. *Market National Bank*, 165 U. S. 537.

Subsequently the lessor sued the officers, directors and shareholders of the bank for the purpose of holding them personally responsible as partners. The proof was that the lessor was not cognizant of the want of authority.

Held, that the defendants are not liable as partners; but the officers who executed the lease, and the directors who authorized it, are personally liable; not on the contract of lease, but in *assumpsit* on an implied warranty that they possessed the requisite authority.

This ruling is in accord with well settled principles. Mechem on Agency, 545, 549, 1 Minor's Inst. (4th ed.) 238; 1 Am. & Eng. Enc. Law (2d ed.) 1127; Story, Agency, 264; *Kroeger* v. *Pitcairn*, 101 Penn. St. 311 (47 Am. Rep. 718);

McCurdy v. *Rogers*, 21 Wis. 197 (91 Am. Dec. 468); *White* v. *Madison*, 26 N. Y. 117. Where the agent knows he is without the requisite authority, and yet contracts with the other party as if he were duly authorized, the other party believing the authority to exist—he is liable either in *assumpsit*, on the implied warranty of authority, or in an action of deceit. Mechem, Agency, 544; 1 Minor's Inst. (4th ed.) 237–8.

Where the contract contains apt words to bind the agent personally, he may of course be sued directly on the contract itself. Mechem, Agency, 550; *Carr* v. *Branch*, 85 Va. 597; *Farrer* v. *Garlington*, 27 S. C. 107 (13 Am. St. Rep. 628 and note; *Ogden* v. *Raymond*, 22 Conn. 379 (58 Am. Dec. 429). But unless there are apt words to bind the agent, the contract itself, if unauthorized, is binding on neither principal nor agent; not on the former, because of the lack of authority, nor on the latter, because he has not contracted in his own name or behalf. Mechem, Agency, 550; *Wallace* v. *Bentley*, 77 Cal. 19 (11 Am. St. Rep. 231 and note); *Jefts* v. *York*, 4 Cush. 371; 10 Cush. 595.

Police Power—Interstate Commerce.—In *Lake Shore, etc. R. Co.* v. *Ohio*, 19 Sup. Ct. 465, it is held in an extremely learned and elaborate opinion by Mr. Justice Harlan, that the police powers of the States extend not only to the health, morals and safely of the public, but also to whatever promotes their peace, comfort and convenience. Accordingly, it is held that a State statute, requiring railway companies incorporated by and operating within the State, to cause three each way of its regular trains, carrying passengers, if so many are run daily, to stop at all towns and villages containing over three thousand inhabitants, for the purpose of taking on and letting off passengers, is not invalid as to railroads engaged in interstate commerce, and operating interstate trains.

"In the absence of legislation by Congress," says Mr. Justice Harlan, "it would be going very far to hold that such an enactment as the one before us was in itself a regulation of interstate commerce. It was for the State to take into consideration all the circumstances affecting passenger travel within its limits, and, as far as practicable, make such regulations as were just to all who might pass over the road in question. It was entitled, of course, to provide for the convenience of persons desiring to travel from one point to another in the State on domestic trains. But it was not bound to ignore the convenience of those who desired to travel from places in the State to places beyond its limits, or the convenience of those outside of the State who wished to come into it. Its statute is in aid of interstate commerce of that character. It was not compelled to look only to the convenience of those who desired to pass through the State without stopping. Any other view of the relations between the State and the corporation created by it would mean that the directors of the corporation could manage its affairs solely with reference to the interests of the stockholders, and without taking into consideration the interests of the general public. It would mean, not only that such directors were the exclusive judges of the manner in which the corporation should discharge the duties imposed upon it in the interest of the public, but that the corporation could so regulate the running of its interstate trains as to build up cities and towns at the ends of its line or at favored points, and by that means destroy or retard the growth and prosperity of those at intervening points. It would mean also that, beyond the power of the State to prevent it, the defendant